IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9783 of 1994

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DEVERSONS PRIVATE LIMITED

Versus

CHAIRMAN,CENTRAL BOARD OF DIRECT TAXES & ORS

Appearance:

1. Special Civil Application No. 9783 of 1994

MR SN DIVETIA for Petitioner No. 1

MR MANISH R BHATT for Respondent No. 1

MR MJ THAKORE for Respondent No. 2

MR RP BHATT for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 01/07/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

At the oral request of Mr SN Divetia, learned

counsel for the petitioner, leave to add Chief Commissioner of Income-tax-I, Aayakar Bhavan, Ashram Road, Ahmedabad as respondent No.4.

Notice of Rule to the newly added party returnable today. Mr Manish Bhatt, learned standing counsel waives service of Rule for the newly added party.

In the facts and circumstances of the case, the petition is taken up for final disposal today.

2. This petition under Article 226 of the Constitution challenges the order dated 31.3.1994 (Annexure "M") passed by the Commissioner of Income-tax, Gujarat-I, Ahmedabad rejecting the petitioner's revision petition under Section 264 of the Income-tax Act, 1961 ("the Act" for short) and rejecting the petitioner's claim to delete the interest of Rs.3,48,122/- levied under Section 234B of the Act for AY 1989-90. The petitioner has also challenged the legality of the order dated 21/28.1.1993 (Annexure "I") of the Central Board of Direct Taxes in regretting its inability to intervene in the matter to waive the above interest.

3. The facts leading to filing of this petition, briefly stated, are as under :-

The petitioner filed on 29.12.1989 its return of income for AY 1989-90 under Section 139(1) of the Act. The petitioner had claimed in the return of income that Export Cash Assistance amount of Rs.7,68,651/- was exempt being a capital receipt. The petitioner had made its claim on the basis of the decision dated 17.11.1989 (Annexure "B") of the Income-tax Appellate Tribunal, Ahmedabad in the case of the petitioner itself for AYs 1982-83 and 1983-84.

The petitioner had paid advance tax as per its return of income as under :-

	Amount Rs.
(1) Advance-tax	2,19,450
(2) Tax deducted at source	148
(3) Tax u/s. 140A	1,72,640
	3,92,238
Interest u/s.234B	27,621

Total	4,19,859

The petitioner had voluntarily paid interest of Rs.27,621/- under Section 234B of the Act because advance tax paid by it was less than 90% of the tax payable on its income shown in its return of income.

Thereafter, the Assessing Officer, respondent No.3 herein, issued an intimation dated 10.1.1990 (Annexure "C") under Section 143(1)(a) accepting the income shown by the petitioner in its return, but determined interest payable under Section 234B of the Act at Rs.31,074/- as against Rs.27,621/- paid by the petitioner and raised a demand for additional interest of Rs.3,453/- under Section 234B of the Act. The petitioner paid the said amount.

Thereafter, the Assessing Officer commenced assessment proceedings under Section 143(3) of the Act for the aforesaid AY 1989-90. During the course of assessment proceedings, by letter dated 22.1.1991 (Annexure "D") the petitioner informed the Assessing Officer that Export Cash Assistance was made taxable with retrospective effect from 1.4.1967 and, therefore, Export Cash Assistance of Rs.7,68,751/- earlier claimed in its return of income as capital receipt, be treated as income.

Thereafter, the Assessing Officer passed order dated 29.10.1991 under Section 143(3) of the Act for AY 1989-90 making addition of Export Cash Assistance of Rs.7,68,751/- and two other similar items with which we are not concerned in this petition. The Assessing Officer also levied interest of Rs.3,48,122/- under Section 234B of the Act on the ground that the advance tax paid by the petitioner under Section 210 was less than 90% of the assessed tax. The said amount of interest was subsequently recovered from the petitioner by adjusting it against the refund for subsequent AY 1990-91.

When the petitioner filed an appeal against the aforesaid order under Section 143(3) of the Act challenging the additions and levy of interest under Section 234B of the Act, the Commissioner of Income-tax (Appeals) granted relief in respect of other items, but held that the appeal was not maintainable against charging of interest under Section 234B of the Act, but the petitioner would be at liberty to take other remedial actions under Section 154 or Section 264 of the Act. The

petitioner, therefore, made a rectification application under Section 154 of the Act before the Assessing Officer, respondent No.3 herein, for deleting interest of Rs.3,48,122/= levied under Section 234B of the Act which came to be rejected by the Assessing Officer by his order dated 17.3.1992 (Annexure "K"). The petitioner challenged the said order by filing a revision petition under Section 264 of the Act before respondent No.2 which also came to be rejected by respondent No.2 by his order dated 31.3.1994 (Annexure "M"). In the meantime, the application made by the petitioner to the Chairman, Central Board of Direct Taxes also came to be rejected by communication dated 21/28.1.1993 (Annexure "I") regretting inability of the Board to intervene in the matter. Hence this petition.

4. At the hearing of this petition, Mr SN Divetia, learned counsel for the petitioner has made the following submissions :-

4.1 In the case of this petitioner itself, the Income-tax Appellate Tribunal had held by order dated 17.11.1989 that Export Cash Assistance was a capital receipt and, therefore, not taxable as income. Hence, when the petitioner filed the return of income on 29.12.1989 for AY 1989-90, the petitioner was fully justified in showing the Export Cash Assistance of Rs.7,68,651/- received in the financial year ended 31.3.1989 as capital receipt. Even the Assessing Officer while issuing the intimation under Section 143(1)(a) had also determined the interest payable under Section 234B of the Act without treating the aforesaid amount of Export Cash Assistance as income. It was only on 16.3.1990 that Finance Bill 1990 was introduced for making Export Cash Assistance taxable and Finance Act 1990 received the assent of the President of India on 31.5.1990. Since the last date for making payment of advance tax for the year in question was 31.3.1989, the petitioner could not have anticipated any such change in law which was going to be made in future. It was, therefore, impossible for the petitioner to pay advance tax on Export Cash Assistance of Rs.7,68,751/- which was held to be exempt by the Income-tax Appellate Tribunal in the petitioner's own case and also earlier by the Income-tax Appellate Tribunal, Special Bench, Delhi in the case of Godore Tools, (1985) Taxation 78(6)-7. It was, therefore, illegal or unfair to charge interest under Section 234B of the Act on the said amount which was subsequently offered by the petitioner itself as income for AY 1989-90 as per the petitioner's letter dated 22.1.1991.

4.2 Mr Divetia has submitted that in any view of the matter, the interest levied under Section 234B of the Act was required to be waived. In support of the said submission, Mr Divetia has placed strong reliance on the decisions of the Apex Court in CIT vs. Hindustan Electro Graphites Ltd., (2000) 243 ITR 48 and in CIT vs. Anjum MH Ghaswala, (2001) 252 ITR 1.

Mr Divetia has also heavily relied on the CBDT Notification No. 400/234/95-IT(B) dated 23.5.1996 and the subsequent Circular No. 783, dated 18.11.1999 in support of his contention that where any income which was not chargeable to income-tax on the date of filing of return, but subsequently in consequence of any retrospective amendment of law, the amount becomes chargeable to income-tax and interest is charged thereon under Section 234B, it is a fit case for reduction or waiver of such interest.

5. On the other hand, Mr Manish Bhatt, learned standing counsel for the respondent authorities has relied on the affidavit in reply of the Deputy Commissioner of Income-tax (Assessment), Special Range-I, Ahmedabad contending that, as held by the Hon'ble Supreme Court in CIT vs. Swadeshi Cotton Mills Co.Ltd., (1982) 135 ITR (ST) 110 SC, the receipt which springs out from the business of the assessee is a revenue receipt and, therefore, the petitioner ought to have offered the Export Cash Assistance amount as its income for the relevant assessment year. It is further submitted that Madras and Calcutta High Courts had held in 107 ITR 168 and 10 Taxman 180 that cash assistance received under a government scheme is taxable as business income and, therefore also, the Export Cash Assistance ought to have been added as income for the relevant assessment year irrespective of the fact whether the section was on the statute book or not.

6. In CIT vs. Hindustan Electro Graphites Ltd., (2000) 243 ITR 48, the Apex Court had an occasion to deal with a similar case, though in the context of levy of additional tax under Section 143(1A) of the Act. In the said case also, the return for AY 1989-90 was filed on 29.12.1989. In view of the amendment by insertion of clause (iiib) in Section 28 of the Act making Export Cash Assistance as taxable w.e.f.1-4-1967 the Assessing Officer in that case passed the order under Section 143(1A) adding the Export Cash Assistance amounts as income and also levying additional tax under Section

143(1A) and also charged consequential interest. The assessee succeeded before the Tribunal and the High Court. Dismissing the revenue's appeal, the Apex Court held that where a return is filed, the law applicable would be the law as it stood on the date of filing of the return. In the instant case, there was not even a bona fide mistake and in fact it was not a case where under some mistaken belief the assessee did not disclose the cash compensatory support received by it. It is true that income by way of cash compensatory support became taxable retrospectively with effect from April 1, 1967, but that was by an amendment of Section 28 by the Finance Act of 1990, which amendment could not have been known before the Finance Act was amended on May 31, 1990. Levy of additional tax bears all the characteristics of penalty. Additional tax was levied as the assessee did not in his return show the income by way of cash compensatory support. After the assessee had filed its return of income, which was correct as per law on the date of filing of the return, the cash compensatory support also came within the sweep of section 28. When additional tax has the imprint of penalty, Revenue cannot say that levy of additional tax is automatic under Section 143(1A) of the Act. If additional tax could be levied in such circumstances it will be punishing the assessee for no fault of his. That cannot ever be the legislative intent. In the circumstances of the case, levy of additional tax taking into account the income by way of cash compensatory support was not warranted.

7. Although the above observations were in the context of levy of additional tax under Section 143(1A), the same reasoning would apply in the matter of waiver of interest under Section 234B of the Act. On the date when the assessee was required to pay advance tax and even on the date of filing of the return, the assessee could not have been expected to pay tax on the Export Cash Assistance received by him in the year ended 31.3.1989 nor to show the same as income in the return filed on 29.12.1989. It was after expiry of the assessment year that there was a statutory amendment with retrospective effect making Export Cash Assistance as taxable with effect from 1.4.1967. Under the circumstances, the notification dated 23.5.1996, particularly para (d) thereof, issued under Section 119(2)(a) would be applicable. The relevant portion of the notification reads as under :-

"In exercise of the powers conferred under clause
(a) of sub-section (2) of Section 119, the

Central Board of Direct Taxes, hereby direct that the Chief Commissioner of income-tax and Director General of Income-tax may reduce or waive interest charged under section 234A or section 234B or section 234C of the Act in the classes of cases or classes of income specified in paragraph 2 of this order for the period and to the extent the Chief Commissioner of Income-tax/Director General of Income-tax deem fit. However, no reduction or waiver of such interest shall be ordered unless the assessee has filed the return of income for the relevant assessment year and paid the entire tax due on the income as assessed except the amount of interest for which reduction or waiver has been requested for. The Chief Commissioner of Income-tax or the Director General of Income-tax may also impose any other conditions deemed fit for the said reduction or waiver of interest.

(a) to (c) ... ...

(d) Where any income which was not chargeable to income-tax on the basis of any order passed in the case of an assessee by the High Court within whose jurisdiction he is assessable to income-tax, and as a result, he did not pay income-tax in relation to such income in any previous year and subsequently, in consequence of any retrospective amendment of law or, as the case may be, the decision of the Supreme Court in his own case, which event has taken place after the end of any such previous year, in any assessment or reassessment proceedings the advance tax paid by the assessee during the financial year immediately preceding the relevant assessment year is found to be less than the amount of advance tax payable on his current income, the assessee is chargeable to interest under Section 234B or Section 234C and the Chief Commissioner or Director-General is satisfied that this is a fit case for reduction or waiver of such interest."

(emphasis supplied)

8. We are, therefore, clearly of the view that the present case would squarely fall under clause (d) of the aforesaid notification. Since the petitioner's tax liability arose subsequently after filing of the return and after expiry of the assessment year on account of

retrospective amendment of law, consequential levy of interest under Section 234B was clearly required to be dealt with as a fit case for reduction or waiver of interest.

9. Since the power of such reduction/waiver is now vested in the Chief Commissioner of Income-tax, we set aside the order dated 31.3.1994 (Annexure "M") passed by the Commissioner of Income-tax, Gujarat-I, Ahmedabad and the order dated 21/28.1.1993 (Annexure "I") of the Central Board of Direct Taxes and direct the Chief Commissioner of Income-tax, respondent No.4 herein, to entertain the petitioner's application for waiver of interest under Section 234B of the Act as per the Notification dated 23.5.1996 issued under Section 119(2)(a) of the Act. If the petitioner makes such an application within three weeks from today, respondent No.4-Chief Commissioner of Income-tax shall decide the same as expeditiously as possible and preferably within three months from the date of receipt of the application.

10. Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.)

(D.A. Mehta, J.)

sundar/-